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No. 92-794

In The

Supreme Court of the United States

October Term, 1992

COMMONWEALTH OF MASSACHUSETTS, et al.,

Petitioners,

v.

GREENWOOD TRUST COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

AMICUS CURIAE BRIEF OF BANKCARD HOLDERS OF AMERICA IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

Bankcard Holders of America ["Bankcard Holders"] submits this brief as *amicus curiae* in support of the Petition for a Writ of Certiorari filed by the Commonwealth of Massachusetts, *et al.*

This Court should grant certiorari to consider whether Congress intended the term "interest" in Section 521 of the Depository Institutions Deregulation and Monetary Control Act of 1980 ["DIDA"][1] to be construed broadly so as to preempt state consumer protection statutes regulating non-interest charges on credit cards. The opinion below found DIDA preemption, even though the legislative history and context of the statute was "inconclusive." (A-41). The First Circuit's opinion wreaks havoc with state consumer protection statutes and adversely affects millions of consumers.

Bankcard Holders is a national, non-profit organization dedicated to consumer credit education and advocacy. Founded in 1980, Bankcard Holders has a current membership of more than 50,000 individual consumers. Bankcard Holders receives no financial support from the banking or credit industry. Instead, it relies on membership dues, charitable donations and publication sales. In addition to its bi-monthly newsletter reporting on credit industry practices and credit card opportunities, the organization has published and distributed educational pamphlets for credit card consumers such as "How to Choose a Credit Card," and "Credit Cards: What You Don't Know Can Cost You!"

The lower court's opinion presents issues of profound and far-reaching importance to consumer credit card holders. Application of the First Circuit's preemption analysis will permit the legislatures in scarcely populated states to trump the consumer protection legislation of densely populated states under the rubric of federal preemption.

SUMMARY OF THE ARGUMENT

The Commonwealth of Massachusetts, along with eighteen states and the District of Columbia (A-3), requested the First

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[1] Pub. L. No. 96-221, 94 Stat. 132 (1980).

Circuit to affirm the well-reasoned opinion of District Judge William G. Young (C-1-126) which had held that states may enact consumer protection laws to protect their residents from delinquency charges, including late charges, imposed by a state-chartered bank (Greenwood Trust Company). Other non-state *amici* joined in that request. (A-2, 3).

Both the District Court, as evidenced by its 12 U.S.C. Section 1292(b) certification (D-1-6), and the First Circuit recognized the "pivotal importance" of the preemption issues presented. The First Circuit stated:

> In light of the pivotal importance and broad commercial consequence of the questions presented, we accepted the certification. (As an aside, we remark that our belief as to the importance of the questions presented has been validated to some degree by the outpouring of amicus briefs, some favoring appellant's position and some opposing it). (A-8)

The question that divided the Parties and *amici* below was described by the First Circuit as whether "a state law banning the imposition of late charges is a law regulating interest within the purview of Section 521" of DIDA. (A-20). That is, "can a federally insured bank, chartered in Delaware, charge its Massachusetts credit-card customers a late fee on delinquent accounts, notwithstanding a Massachusetts statute explicitly prohibiting the practice?" (A-4).

This Court should grant certiorari and reverse the judgment below because, among other things, the decision:

1. Conflicts in principle with the decisions of this Court in *National Bank v. Johnson*, 104 U.S. 271 (1881); *Haseltine v. Central Bank of Springfield*, 183 U.S. 132 (1901); and *Evans v. National Bank of Savannah*, 251 U.S. 108 (1919);
2. Expands the meaning of the term "interest" in Section 521 of DIDA, and thus the scope of the statute's preemption, so as to include "non-interest" delinquency charges like late fees in a manner which conflicts with Congress' understanding in DIDA and the common law meaning of the term "interest;" and
3. Conflicts with the "legislative history" and the "historical context" of Section 85 of the National Bank Act (which this Court in *Marquette Nat'l Bank v. First of Omaha Serv. Corp.*,

439 U.S. 299, 314 (1978), suggested must be considered), even though the court below determined that Section 521 of DIDA was modeled after Section 85 of the National Bank Act.

The First Circuit's opinion is being widely cited in state and federal courts to disembowel many different state consumer protection statutes and state common laws limiting contractual penalty charges like late fees. It is vitally important to states and consumers across the nation that this Court review and reverse the decision below.

ARGUMENT

I. REVIEW SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS IN PRINCIPLE WITH THE MANY DECISIONS OF THIS COURT REQUIRING PREEMPTION TO BE DETERMINED BY A UNIFORM FEDERAL STANDARD.

A. It Was Improper To Consider What Delaware Defines As Interest In Determining The Meaning Of Interest Under Section 521.

The opinion below looked to both federal and Delaware law for the meaning of "interest" in Section 521. Reasoning that the result would be no different under federal or state law, the First Circuit said it was unnecessary to choose one over the other. (A-43-44). That assertion conflicts in principle with this Court's prior decisions.

In *Haseltine v. Central Bank of Springfield*, 183 U.S. 132 (1901), and *Evans v. National Bank of Savannah*, 251 U.S. 108 (1919), this Court clearly found that federal law, rather than state law, should provide the context and the scope of the term "usury" in Section 85 of the National Bank Act. In *Haseltine*, this Court stated that "the definition of usury and the penalties affixed thereto must be determined by the National Banking Act, and not by the law of the State." 183 U.S. at 134.

Subsequently, in *Evans*, this Court recognized that both "interest" and "usury" were determined by reference to federal law, stating:

> The maximum interest rate allowed by the Georgia statute is eight per centum. That marks the limit which a

> national bank there located may charge upon discounts; but its right to retain so much arises from federal law. The latter *also* completely defines what constitutes the taking of usury by a national bank, referring to the state law only to determine the maximum permitted rate.

251 U.S. at 114 (emphasis added).[2]

This Court has also recognized the danger in referring to state law when the question is one of federal law. In *First Nat'l Bank v. Dickinson*, 396 U.S. 122 (1969), the Court considered whether federal or state law defined the term "branch" in the National Bank Act. This Court recognized that to permit state legislatures to define the federal term "branch" would "make them the sole judges of their own powers," and that Congress "did not intend such an improbable result":

> We reject the contention . . . that state law definitions of what constitutes "branch banking" must control the content of the federal definition of § 36(f). . . . [T]o allow the States to define the content of the term "branch" would make them the sole judges of their own powers. Congress did not intend such an improbable result, as appears from the inclusion in § 36 of a general definition of "branch."

396 U.S. at 133-34.

The First Circuit's opinion permits just such an "improbable result" without any finding that Congress intended it. The First Circuit analyzed Delaware's statute and found that it "explicitly incorporates late charges into the definition of interest and allows lenders to assess such fees against credit-card customers." (A-46-47). The First Circuit rationalized this analysis, stating: "Thus, were we to look to Delaware law for help in fathoming the meaning of 'interest' and 'interest rates,' late charges would be included." (A-47).

This Court should review and reject the First Circuit's method of analyzing the preemption question presented. How the anti-consumer legislature in Delaware defined the term "interest" is irrelevant to what Congress intended when it used the term to define the scope of federal preemption in Section 521.

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[2] *See also Partain v. First Nat'l Bank*, 467 F.2d 167, 171 (5th Cir. 1972).

B. Congressional Use Of The Term "Interest" And "Discount" In Other Statutes Further Supports Massachusetts' Legal Position In This Case.

In construing the statutory term "interest" in other contexts, this Court has recognized that it has a long-standing, well-established meaning. See *Old Colony R. Co. v. Commissioner*, 284 U.S. 552, 561 (1931) (Internal Revenue Code), where this Court stated:

> [T]hat in the common understanding "interest" means what is usually called interest by those who pay and those who receive the amount so denominated in bond and coupon, and that the words of the statute permit the deduction of that sum, and do not refer to some esoteric concept derived from subtle and theoretic analysis.

Late fees are *not* paid in "bond and coupon."

Shortly after *Old Colony*, this Court, in *Deputy v. DuPont*, 308 U.S. 488 (1939), recognized an ordinary use of the term "interest":

> In the business world "interest on indebtedness" means *compensation for the use or forbearance on money.* In absence of clear evidence to the contrary, we assume that Congress has used these words in that sense.

Id. at 498 (emphasis added). Late fees are not "compensation for the use of money," but charges for a default within the control of the *borrower*.[3]

There is still other evidence of the Congressional use of the term "interest" in the National Bank Act, which served as a model for DIDA. (A-32). Section 85 of the National Bank Act provides, in relevant part:

> **§ 85. Rate of interest on loans, discounts and purchases**
>
> Any association may take, receive, reserve, and charge on any *loan or discount* made, or upon any notes, bills of exchange, or other evidence of debt,

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[3] If a late fee was "interest," then the borrower would cause the lender to commit usury by a default and then could sue the lender for usury. This makes no sense, even from a lender's viewpoint.

> *interest* at the rate allowed by the laws of the State, Territory, or District where the bank is located. . . .

12 U.S.C. § 85 (emphasis added).[4]

Therefore, "interest," whether with respect to a "loan" or a "discount," is the same and must be interpreted in an identical manner. In *National Bank v. Johnson*, 104 U.S. 271 (1881), this Court held that the terms "loans" and "discounts" are "synonyms," and "both are expressly made subject to the same rate of interest." *Id.* at 277. The Court in *Johnson* also noted the limitations of its decision in *Tiffany v. National Bank of Missouri*, 85 U.S. (18 Wall.) 409 (1874), which the court below overlooked:

> All that was said in that case [*Tiffany*] related to loans and to the rate of interest that was allowed thereon; and it was held that where by the laws of a State in which a national bank was located one-rate of interest was lawful for natural persons and a different one to State banks, the national bank was authorized to charge on its loans the higher of the two. *The sole particular in which national banks are placed on an equality with natural persons is as to the rate of interest, and not as to the character of contracts they are authorized to make; and that rate thus ascertained is made applicable both to loans and discounts, if there be any difference between them.*

Johnson, 104 U.S. at 277 (emphasis added).

The term "discount rate," which is used in the same sentence as the term "interest" in Sections 85 and 521, is understood today to be the rate the Federal Reserve charges member banks for loans at the discount window.[5] In the 1800's, as today, the discount rate[6] was always expressed as a rate *per period of time* for loans or

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[4] The language in § 521, 12 U.S.C. § 1831(d), is virtually identical to Section 85, 12 U.S.C. § 85.

[5] *See, e.g.*, L. Ritter & W. Silber, *Principles of Money, Banking, and Financial Markets*, 169-183 (3d ed. 1983) ("*Principles of Money*"); T. Simpson, *Money, Banking and Economic Analysis*, 169-192 (2d ed. 1981) ("*Money, Banking*").

[6] The term "discount rate" has roots extending back to at least the 1700's, when it was common practice for the Bank of England to extend loans to the Crown by way of discounting notes or bonds issued by the British government. *See Principles of Money* at 170 & n.2; *Money, Banking* at 174.

discounts on collateral paper. *Cf., e.g., Evans v. Nat'l Bank*, 251 U.S. at 114; Breckenridge, *Discount Rates in the United States*, 13 Pol. Sci. Q. 119, 120-122 (Table) (1898) ("*Discount Rates*"), *cited with approval in Marquette*, 439 U.S. at 317. Although discount interest is collected at the outset of a loan while loan interest is typically paid periodically after a loan has been made, the elements of the terms "discount rate" and "interest rate" are identical.[7] Thus, interest on a "loan" or on a "discount" must be calculated the same way. *Cf., Johnson*, 104 U.S. at 277.

With reference to discounts, a precise rate has been regularly published in financial periodicals and, for at least the last twenty years, in the Federal Register and in various Federal Reserve Board publications. *See, e.g.*, 12 C.F.R. §§ 201.4-201.52 (1991); 45 Fed. Reg. 54,010 (1980); *Federal Reserve Bulletin* (1970-1992). The published "discount rate" has *never* included surcharges, penalty charges, or any other charge other than the base rate. *Cf., e.g., Discount Rates*, 13 Pol. Sci. Q. at 120-122 (describing *Bradstreet's* reports). In addition, it has always been a fundamental assumption of domestic economic and monetary policy that the "discount rate" refers *only* to the published, base rate, and not to any other type of charge.[8]

The parallel usage of the terms "interest" and "discount" in the National Bank Act and in DIDA demonstrates that Congress intended "interest rate" in DIDA to include the same elements as "discount rate" and to be construed as the two terms have been historically used at common law.[9] Because discount interest does not include late fees, Congress could not have intended loan interest to include such charges in DIDA.

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[7] *Cf., Principles of Money* at 174 n.5.

[8] *See generally Principles of Money* at 170-195; *Money, Banking* at 214-15.

[9] *Cf. Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307 (1961) (an important statutory term should be construed consistent with the other terms with which it is associated).

C. The First Circuit Failed To Employ The Appropriate Method For Analyzing A Federal Preemption Provision.

In determining what Congress intended when it used the term "interest," the First Circuit concluded that the legislative history and historical context of DIDA were "inconclusive." (A-41). Under this Court's recent preemption opinion in *Cipollone v. Liggett Group, Inc.*, 112 S.Ct. 2608 (1992), when the First Circuit found the statute's text and legislative history "inconclusive" (A-41), it should have construed Section 521 narrowly and found no preemption.

It did exactly the opposite. Instead of reading Section 521 narrowly, the First Circuit wandered off on its own path of statutory interpretation to determine if late fees could be considered "interest." It began by determining that the purpose of DIDA was "to strike a competitive balance between state and national lending institutions by giving them equal power in charging *interest rates*." (A-51) (emphasis added). Next, it recognized that if it read the term "interest rates" expansively so as to include "fees in connection with the extension and maintenance of credit," that reading would ensure "parity" between state and national lending institutions. (A-53-54).[10] Finally, it found "no reason to define either the term 'interest' or the term 'interest rates,' for purposes of section 521, in a manner that excludes late fees." (A-53).

The problem with the lower court's analysis is that it disregards the meaning of "interest" at common law, and as used by Congress when it enacted both the National Bank Act and DIDA. One result of this misdirected analysis is that the scope of DIDA's federal preemption of state consumer laws may be determined by individual, anti-consumer states. The "improbable result" criticized by this Court in *First Nat'l Bank v. Dickinson* has happened here. One state (Delaware) has preempted the state consumer laws of

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[10] In fact, national banks, under Section 85 of the National Bank Act, cannot charge late fees as "interest" for the reasons stated in this brief (*i.e.*, the common law definition of interest did not include special default or penalty charges, which is also shown by the "legislative history" and the "historical context" of the National Bank Act). The First Circuit erroneously assumed that Section 85 "interest" included within its scope "late fees."

another state (Massachusetts) by redefining the term "interest" so as to include delinquency charges (late fees) and penalties which were not permitted at common law and were not intended by Congress to constitute "interest."

II. REVIEW SHOULD BE GRANTED BECAUSE THE FIRST CIRCUIT'S OPINION CONFLICTS WITH WHAT CONGRESS INTENDED THE TERM "INTEREST" TO MEAN.

In the opinion below, the First Circuit, without analysis, erroneously asserted that "federal case law has long suggested that, in ordinary usage, interest may encompass late fees. . . . " (A-24).

In fact, the exact opposite is true. Late charges *not measured by time* were historically prohibited under both federal and state laws and were considered not to constitute "interest." Historically, amounts owed a lender, *measured by time*, were sometimes called "damages." However, "damages" that were *not measured over time*, but instead represented a sum certain, were considered to be liquidated damages or penalties, and were prohibited at common law.[11]

In 1864, Congress enacted Section 85 of the National Bank Act, upon which Section 521 of DIDA was modeled. (A-32-35). The First Circuit should have, but did not, consider the common law meaning of the term "interest" in 1864 when Congress included the term in the National Bank Act.[12]

In interpreting a federal statute, this Court has followed "the axiom that words used in a statute are to be given their ordinary meaning in the absence of persuasive reasons to the contrary." *Burns v. Alcala*, 420 U.S. 575, 580-81 (1975)

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[11] This Court considered the common law highly relevant in ascertaining congressional intent and the preemptive scope of Section 85 in *Marquette*. *See* 439 U.S. at 317 (citing common law cases involving interstate loans of which Congress would be presumed to have knowledge).

[12] Significantly, it is this definition that Congress is presumed to have intended in 1864 when it used the term. *See Maillard v. Lawrence*, 57 U.S. (16 How.) 251, 261 (1853), ("The popular or perceived import of words furnishes the general rule for the interpretation of public laws.").

(defining "child"); *see also Perrin v. United States*, 444 U.S. 37, 42-3 (1979) ("we look to the ordinary meaning" and "consider first the development and evolution of the common law definition [of bribery]."). Application of this principle to the term "interest" in the National Bank Act and in DIDA would require reversal of the First Circuit's decision.

A. The Common Law Meaning of The Term "Interest"

There is no indication that Congress intended "interest" in Section 521 to be different from the common law meaning of the term. The First Circuit should have applied the settled rule of statutory construction set forth in *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989): "Where Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." *Id.* at 739-40 (citation omitted). At common law, the term "interest," when employed in connection with a loan of money, was defined as "the compensation which is paid by the borrower to the lender, or by the debtor to the creditor, for its use." *Davis v. Rider*, 53 Ill. 416, 417 (1870). *See also Kelsey v. Murphy*, 30 Pa. (6 Casey) 340, 341 (1858) ("Interest has been defined to be a compensation allowed to the creditor for delay of payment by the debtor."); *Gaar v. Louisville Banking Co.*, 74 Ken. (11 Bush) 180, 189 (1874) ("Interest is the premium allowed by law for the use of money."). The components of interest were the amount charged, the amount loaned, and *the time* involved. "At common law, interest is the consideration or price that is agreed between the parties, to be paid for the use of money *for a stipulated time*." *County of Madison v. Bartlett*, 2 Ill. 67, 69 (1832) (emphasis added).[13]

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[13] Historically, Delaware also defined "interest," as have petitioners here, as the compensation, measured by time, for a loan of money. *See, e.g., Agostini v. Colonial Trust Co.*, 36 A.2d 33, 36 (Del. Ch. 1944). Effective June 28, 1988, by a unique statutory definition of "interest," Delaware determined for the first time that

At common law, in the event of a loan default in payment, the remedy was limited to interest or damages in the nature of interest. *See Ferris v. Barlow*, 2 Aikens 106 (Vt. 1827) ("In the case of a breach of a contract for the payment of money, the amount contracted to be paid, together with the interest from the time fixed for performance, is the measure of damages."). "Interest" payable post-default was always measured by time. *See Selleck v. French*, 1 Conn. 32, 33 (1814) ("interest will be computed from the time money becomes due.").

As recognized in *Parsons on Notes and Bills*:

> [I]f the borrower agrees to pay the sum borrowed at a time certain, or on demand, with lawful interest, and if he fails to do so, so much more by way of penalty, even if it be called extra interest, this is not such usury as would affect the contract, because the borrower has a right to pay the principal and avoid the penalty. We should say, however, that if he did not pay the principal, nothing more than that with lawful interest could be recovered from him.

2 *Parsons on Notes and Bills* 413 (1871).

B. The Common Law Treatment Of Other Non-Interest Charges

In *Young v. Godbe*, 82 U.S. (15 Wall.) 562 (1872), this Court held, "If a debt ought to be paid at a particular time, and is not, owing to the default of the debtor, the creditor is entitled to interest *from that time* by way of compensation *for the delay* in payment." *Id.* at 565 (emphasis added).

In *Loudon v. Taxing District*, 104 U.S. (14 Otto) 771 (1881), this Court recognized this long-standing common law

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delinquency charges like late fees could be charged "as interest." *See* Del. Code Ann. tit. 5, § 945 (Supp. 1990). To take advantage of this favorable banking law, a lender intending to issue credit cards from a Delaware location must employ at least 250 persons in Delaware before it may be organized as a Delaware "consumer credit bank." *See* Del. Code Ann. tit. 5, §§ 1001-1056 (1985 and Supp. 1990). Delaware thus has chosen employment benefits over consumer protection.

principle and did *not* allow damages *except* those that were measured by time:

> It is sufficient to say that all damages for delay in the payment of money owing upon contract are provided for in the allowance of interest, which is in the nature of damages for withholding money that is due. *The law assumes that interest is the measure of all such damages.*

Id. at 774 (emphasis added).

"Special charges" not measured by time, like late charges, return check charges, and over-credit limit charges, were prohibited. *See New Orleans Ins. Co. v. Piaggio*, 83 U.S. (16 Wall.) 378, 386 (1872) (a party "cannot recover special damages for the detention of money due to him beyond what the law allows as interest.").[14]

Special damages, such as Greenwood's late charges, are entirely different from damages *measured over time*. They are in the nature of penalties. They do not accrue over time. Although damages measured by time were permitted at common law as equivalent to interest, flat fee penalty charges were not. *See, e.g., Gower v. Carter*, 3 Iowa 244 (1856):

> It may, therefore, be laid down as a settled rule, that no other sum can now be recovered under a penalty, than that which shall compensate the plaintiff for his actual loss. The penalty is in no sense the measure of compensation. . . . [I]t may be stated as a general rule, that a promise of paying a penalty beyond the amount of legal interest, cannot be enforced.

Id. at 253-54.

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[14] The opinion below appears to have miscited this Court when it relies on *Shoemaker v. United States*, 147 U.S. 282 (1893), and *Brown v. Hiatts*, 82 U.S. (15 Wall.) 177 (1873), as authority for concluding that Greenwood's late fees may be "interest." (A-24, 25). In *Shoemaker v. United States*, this Court recognized that interest ("in the nature of damage") can "accrue." 147 U.S. at 321. Late fees, however, cannot accrue because they are not measured over time. Likewise, in *Brown v. Hiatts*, this Court held that "interest" and "damages" could only be charged as "allowed by law" and, therefore, did not accumulate ("run") during the Civil War when the obligation to repay the principal of a loan was suspended. 82 U.S. at 185-86. In both cases, damages, like interest, were measured by time.

At common law, Greenwood's late charges would never have been characterized as interest because they are not measured over time and are not "compensation for the use or forbearance of money."[15] Late charges are charges for a borrower's default. The charges are in the nature of special damages, *not* damages in the nature of interest, which must be measured over time. They are not "interest" in the ordinary or common law sense of the word.[16]

The First Circuit's interpretation of the term "interest," which defines the scope of federal preemption of state laws, is inconsistent with the common law meaning of the term. Because the court below did not find any Congressional intent to override this common law meaning, it should not have redefined "interest" to include delinquency charges like late fees.

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[15] Interest, of course, as recognized by the First Circuit, may be expressed as a percentage or the economic equivalent of a percentage. (A-23, 24). For example, on a $1,000 loan, a borrower may pay 10% interest or $100 interest *for a measured time period*. Whether expressed as a percentage or a dollar amount, the figure must represent *the measure of compensation per unit of time* or a "rate." The passage of time or duration of the loan is a key element of all definitions of "interest rate," just as the time of travel and the distance traveled are key elements of the definition of the rate of speed.

[16] The opinion below cites a long string of cases asserting that they stand for the principle that the charge in issue was "interest." *See, e.g., Daggs v. Phoenix Nat'l Bank*, 177 U.S. 549 (1900) (upfront fee); *Northway Lanes v. Hackley Union Nat'l Bank & Trust Co.*, 464 F.2d 855 (6th Cir. 1972) (upfront closing costs). (A-46). These cases, however, did *not* "decide" that the charge in issue was "interest." They only "assumed" that the charge was "interest" since *no* party argued to the contrary. The issue as to what the term "interest" means was not litigated in those courts. The court below thus overlooked the settled rule that "unstated assumptions on non-litigated issues are not precedential holdings binding future decisions." *Sakamoto v. Duty Free Shoppers, Ltd.*, 764 F.2d 1285, 1288 (9th Cir. 1985), *cert. denied*, 475 U.S. 993 (1986). Quite simply, "a statement . . . that describes a statute without purporting to resolve a disputed question is not binding when the question finally arrives for decision. *Zenith Radio Corp. v. United States*, 437 U.S. 443, 459-62, 98 S.Ct. 2441, 2449-51, 57 L.Ed.2d 337 (1978)." *United States v. House*, 808 F.2d 508, 511 (7th Cir. 1986). Moreover, whether upfront charges, irrespective of the label, are in reality disguised "interest" *for a loan* is irrelevant as to whether a *post-loan* delinquency charge constitutes interest.

III. REVIEW SHOULD BE GRANTED BECAUSE THE FIRST CIRCUIT FAILED TO FOLLOW THE ANALYSIS SUGGESTED BY THIS COURT IN *MARQUETTE*, AND DID NOT REVIEW THE "LEGISLATIVE HISTORY" AND THE "HISTORICAL CONTEXT" OF DIDA OR THE NATIONAL BANK ACT.

In *Marquette*, this Court recognized that to resolve the 12 U.S.C. Section 85 statutory interpretation question, a "[c]lose examination of the National Bank Act of 1864, its legislative history, and its historical context" was required. 439 U.S. at 314. Following this analysis, the First Circuit should not have interpreted DIDA's preemption provision without considering DIDA's 1979 predecessor Act,[17] and the Senate Report that accompanied DIDA.[18]

Moreover, although the court below considered Section 85 of the National Bank Act very instructive, it failed to consider the legislative history of that Act. Once it found that DIDA's legislative history was "inconclusive" (A-41), the court should have examined the legislative history and historical context of the National Bank Act. Had it undertaken such a review, the court of appeals would have been compelled to affirm the district court.

A. The Legislative History And Historical Context Of Section 521 Of DIDA

Three months *before* the passage of Section 521 of DIDA, the 96th Congress passed Pub. L. No. 96-161[19] [the "Temporary Preemption Act"] as an interim act to be effective until March 31, 1980. The Temporary Preemption Act (the immediate predecessor to DIDA) consisted of only two Titles:

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[17] *See* Automatic Transfer Accounts – Commercial Banks, Pub. L. No. 96-161, 93 Stat. 1233 (1979), *reprinted in* 1979 U.S.C.C.A.N., Vol. 1 ["the Temporary Preemption Act"].

[18] S. Rep. No. 368, 96th Cong., 2d Sess. 1 (1980), *reprinted in* 1980 U.S.C.C.A.N 236.

[19] Pub. L. No. 96-161, § 104, 93 Stat. 1233, 1234 (1979).

Title I – "Consumer Services and Usury"

Title II – "Interest Rate Amendments Regarding State Usury Ceilings On Certain Loans"

In the Temporary Preemption Act, the 96th Congress used the terms "interest" and "other charges" to denote different types of charges.[20] Under the Act:

1. Section 105(a)(1) preempted "interest" *and* "other charges on any such loan;"

2. Section 105(a)(2) preempted only "interest," *not* "other charges;"

3. Section 105(b) permitted a state to opt-out of the "interest" preemption provision on or before March 30, 1980;

4. Section 105(b) permitted a state to opt-out of the "other charge" preemption provision at any time; and

5. Title II, pertaining to other loans, preempted only state "interest" charges, not "other charges" on any such loan.

In Title One, Section 105(c) of the Temporary Preemption Act, the 96th Congress delegated to the Federal Home Loan Bank Board ["FHLBB"] the power to promulgate rules and regulations. Pursuant to this express delegation, on *January 3, 1980*, the FHLBB published 45 Fed. Reg. 1853 (1980) (to be codified at 12 C.F.R. § 590.3(b)), in which the FHLBB recognized that "interest" and "other charges" were *not* late charges, and therefore provided that a state's late charge laws were *not* preempted:

> Nothing in this section preempts limitations in state laws on prepayment charges, attorneys' fees, *late charges* or other provisions designed to protect borrowers.

12 C.F.R. § 590.3(b) (emphasis added).

In acting pursuant to its express delegation, the FHLBB concluded that the 96th Congress, when preempting state regulation of "interest" and "other charges" for a loan, did not intend to

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[20] Section 105(a)(1) read:

> The provisions of the constitution or laws of any State expressly limiting the rate or amount of *interest*, discount points, or *other charges* which may be charged, taken, received, or reserved shall not apply to any loan, mortgage, or advance which is . . . [secured by a first lien on residential real property].

preempt state regulation of late charges. The FHLBB, in its reasoning, referred to the earlier *October 15, 1979* Senate Banking Committee Report No. 96-368 (which also accompanied DIDA):

> In addition, the regulations reflect the intention stated in Senate Banking Committee Report No. 96-368 (96th Cong., 1st Sess., October 15, 1979) that the preemption not affect limitations on prepayment charges, attorneys' fees, late charges or similar provisions in State laws designed to protect borrowers.

45 Fed. Reg. 1853.

Thus, the contemporaneous interpretation of the statute by the agency charged with promulgating regulations under the Act found that "late charges" were not within the scope of the preemption effected by either of the statutory terms "interest" or "other charges."[21]

Consideration of this pre-March, 1980 legislative history demonstrates that delinquency or late charges were not considered "interest" or even "other charges" for a loan by the 96th Congress, and were not intended to be preempted. The First Circuit ignored this legislative history. (A-49).

On March 31, 1980, the 96th Congress passed DIDA. Like the earlier enacted Temporary Preemption Act, DIDA preempts only state "interest" laws, and does *not* generally preempt laws enacted by the states to protect consumers.

In Title V of Pub. L. No. 96-221 (DIDA), the 96th Congress followed the identical pattern it had previously used in the Temporary Preemption Act, and once again recognized the difference

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[21] Significantly, at this time, Congress was well aware of the difference between "interest" and "delinquency charges," including late fees. *See, e.g., Johnson v. McCracken-Sturman Ford, Inc.*, 527 F.2d 257, 265-66 (3d Cir. 1975):

> [P]rior to enactment of the [Truth In Lending] Act, the terms "default charges" and "delinquency charges" had well established meanings in the commercial credit field and in other consumer credit legislation, *and it is certain that Congress was well aware of these definitions*. . . . . In the commercial credit field and in other consumer credit legislation, the terms "delinquency charges" and "default charges" generally refer to specific pecuniary sums that are assessed against the borrower solely because of his failure to make his payments in a timely manner. They are sums above and beyond the amount ordinarily due in the event of timely payment.

between "interest" and "other charges" for a loan and late charges for a default. *See, e.g.*, 12 U.S.C. § 1735f-7a(a)(1). It also recognized the difference, as did the FHLBB in 12 C.F.R. § 590.3(b), between "interest," "other charges," and "late charges."

In this connection, Title V includes the term "other charges" for a loan only in 12 U.S.C. § 1735f-7(a), which governs all residential first mortgages, and "late charges" only in 12 U.S.C. § 1735f-7a(c)(1). Title V then omits the phrase "other charges" and "late charges" in the preemptive provisions of Sections 511, 521, 522, 523 and 524 governing other types of loans.[22] Therefore, "late charges" are not preempted.[23]

In DIDA, the FHLBB was once again expressly given power to promulgate rules and regulations. *See* 12 U.S.C. § 1735f-7a(c)(4). In response, the FHLBB promptly reenacted its "late charge" regulation at 12 C.F.R. § 590.3(c). *See* 45 Fed. Reg. 24,113 (Apr. 9, 1980), as amended, 45 Fed. Reg. 28,306 (Apr. 16, 1980).

Congressional intent to use the term "interest" to exclude delinquency charges like late charges is also apparent in other sections of the October 15, 1979 Senate Report which accompanied DIDA. That Report referred to the "annual percentage rate" language of the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601, *et seq.*, as follows:

> *In exempting mortgage loans from state usury limitations, the Committee intends to exempt only those limitations that are included in the annual percentage rate.* The Committee does not intend to exempt limitations on prepayment charges, attorney fees, *late charges* or similar limitations designed to protect borrowers.

S. Rep. No. 368, 96th Cong., 2d Sess. at 19, *reprinted in* 1980 U.S.C.C.A.N. at 255 (emphasis added).

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[22] Depository Institutions Deregulation & Monetary Control Act of 1980, Pub. L. No. 96-221, 94 Stat. 161.

[23] Different statutory words (*i.e.*, "interest," "other charges," "late charges") may mean the same thing if it is not apparent that Congress intended to effect a major change or to create new laws. *See Dewsnup v. Timm*, 112 S. Ct. 773, 777-78 (1992). The First Circuit stood this principle on its head when it cited *Dewsnup* for the rule that different statutory words may mean the same thing, even when such an interpretation effects a major change and creates new law.

Delinquency charges, like late charges, are *excluded* from the definition of the "annual percentage rate" in TILA. *See Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 561 (1980). Therefore, late charges, by definition, are also excluded from "interest" since "interest" is part of the annual percentage rate.

The First Circuit's conclusion that the "legislative history" and "historical context" of DIDA were "inconclusive" (A-41), is belied by Pub. L. No. 96-161 and the October 15, 1979 Senate Banking Committee Report. DIDA's legislative history shows that Congress never intended to preempt state laws regulating late charges and other non-interest charges.

B. The Legislative History And Historical Context Of The National Bank Act

While the opinion below recognized that Section 521 was modeled after Section 85, the First Circuit did not review the legislative history of the National Bank Act to determine the scope of preemption intended in that Act.[24] Had it done so, the First Circuit necessarily would have concluded that Congress used the term "interest" consistent with the common law definition of a charge measured over time for the use of money.

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[24] The court below found it unnecessary to consider the views of the Office of the Comptroller of the Currency (OCC) or the contrary views of his Staff on whether a late fee is "interest" under Section 85 of the National Bank Act. *See* the Opinion of Comptroller James J. Saxon in his June 25, 1964 letter, stating that late fees are *not* "interest:"

> Secondly, you inquired as to what charges paid by consumers for consumer credit obtained from a national bank with respect to auto financing are not considered to be interest. Charges for late payments, credit life insurance, recording fees, documentary stamp are illustrations of charges which are made by some banks which would not properly be characterized as interest. (This letter is reprinted as Exhibit A to this brief).

The OCC *Staff*, in a series of opinions commencing in 1988, disagreed. *See, e.g.*, Letter of Robert Serino, OCC Deputy Chief Counsel [1988-1989 Transfer Binder] Fed. Banking L. Rep. (CCH) 85,676 (Aug. 11, 1988), where Mr. Serino concluded that even a national bank's attorneys' fees in collection efforts (as well as late fees) were "interest."

The National Bank Act debates in 1864 focused on (1) whether there should be a uniform maximum interest rate, (2) whether national banks should be allowed to charge an interest rate equal to the rate allowed to any lender, or instead, limited to the interest rate permitted for state banks, and (3) whether each state should be allowed some control over the rate of interest charged by a national bank located in the state. In the course of debating those issues, it was manifest that Congress understood the term "rate of interest" to mean a charge *measured over time* for the use of money. *See, e.g.*, Cong. Globe, 38th Cong., 1st Sess. 1353 (1864) (Rep. Cole of California: "In California the interest is by law, where no rate is expressed in the contract, ten percent per annum.").[25]

In each and every case, the Senators and Representatives of California, Illinois, Indiana, Iowa, Maine, Massachusetts, Michigan, Ohio, Pennsylvania and Wisconsin considered the "rate of interest" with reference to a period of time and with reference to their own state's laws *which, without exception, also measured interest by time. See, e.g.*, 1857 Ill. Laws 45, Section 1; 1853 Iowa Laws, 4th General Assembly 67; 1843 Mich. Pub. Act No. 47; 1824 Ohio Laws 108; 1858 Pa. Laws 622; 1860 Wis. Laws ch. 202, Section 1.

No Congressional statement exists indicating that the regulation of the "rate of interest" occurs *without reference to time*. Thus, there is no indication that the 38th Congress understood "rate of interest" to include delinquency or default charges *not measured by time* and that do not even represent compensation for a loan.

The legislative history of the National Bank Act, which shows that Congress intended to preempt only state laws limiting time-based loan charges, was improperly ignored by the First Circuit. The First Circuit's opinion should have considered what the term "interest" meant at common law. It should have determined what the term meant to the 38th Congress in 1864 when it passed the National Bank Act. It should have determined whether any change

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[25] *See also* Cong. Globe, 38th Cong., 1st Sess. at 1374 (Rep. Kasson of Iowa, "In my own State, sir, we allow a rate of interest of ten percent per annum, and the banks in that State [Iowa] are allowed a rate of interest of eight percent per annum.")

in meaning was intended in 1980 when Congress used the same term to govern the scope of preemption under DIDA.

The glaring deficiencies in the First Circuit's preemption analysis are not without consequences. The consumer protection statutes of Massachusetts and numerous other states regulating non-interest charges have, in effect, been decimated under the rubric of federal preemption in a manner never intended by Congress. Hundreds of thousands of credit card holders have been and will be affected by the decision below. This Court should not leave the decision unreviewed.

CONCLUSION

For the reasons stated in the petition for certiorari filed by the Commonwealth of Massachusetts, *et al.*, and in this Amicus Brief in support of that petition, Bankcard Holders respectfully requests that the petition be granted.

Respectfully submitted,

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*** Counsel of Record**

Dated: December 4, 1992

EXHIBIT A

JUN 25 1964

In your letter of May 22, 1964, you made three inquiries.

First, you ask the maximum interest rate that a National Bank may charge in certain specified states. Subject to certain exceptions it may generally be stated that National Banks in California, Illinois, Wisconsin and Kansas may charge interest at a rate up to ten per centum per annum, while in Illinois the normal maximum rate is seven per centum per annum.

Secondly, you inquired as to what charges paid by consumers for consumer credit obtained from a National Bank with respect to auto financing are not considered to be interest. Charges for late payments, credit life insurance, recording fees, documentary stamp are illustrations of charges which are made by some banks which would not properly be characterized as interest.

Thirdly, you requested information as to the formula used by bank examiner to convert charges to rate equivalent for purpose of determining whether the charges are at an excessive rate. Because of the inter-relation of state laws with Federal laws there is no set formula. The examiner must look at each questioned transaction with the view of uncovering any unlawful practice on the part of the lending institution. In questionable cases the problem is referred to the Law Department of the Office of the Comptroller of the Currency for review.

If you should desire any additional information this Office would be please [sic] to furnish such information upon request.

Sincerely,

(Signed) James J. Saxon

James J. Saxon
Comptroller of the Currency